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RECOVERY OF COURT-APPOINTED DEFENSE COSTS: FRAMEWORK FOR A MODEL RECOUPMENT STATUTE

The right to court-appointed counsel of those criminal defendants who are unable to afford retained counsel was first announced by the United States Supreme Court in 1932 in *Powell v. Alabama*,¹ where the Court held that the due process clause of the fourteenth amendment² rendered the sixth amendment's guarantee of the right to the assistance of counsel³ applicable to the states, and, as a result, all indigent defendants were entitled to appointed counsel in capital cases. Although ten years later the Court appeared to back off somewhat in *Betts v. Brady*,⁴ in 1963 the right to appointed counsel was extended to all needy felony defendants in *Gideon v. Wainwright*.⁵ Following *Gideon*, this right was quickly expanded to include both representation at various "critical stages"⁶ of criminal proceedings as well as representation for less serious offenses.⁷ The expansion culminated in *Argersinger v. Hamlin*,⁸ where counsel was held to be required for any criminal proceeding which could result in incarceration, no matter how brief.⁹

1. 287 U.S. 45 (1932).

2. U.S. CONST. amend. XIV, § 1 provides, in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law

3. U.S. CONST. amend. VI provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

4. 316 U.S. 455 (1942). *Betts* held that the right to appointed counsel should be considered in light of principles of fundamental fairness on a case-by-case basis and should be mandated only when special circumstances were present. In subsequent cases, the Court usually found such circumstances. In fact, in the thirteen-year period preceding *Gideon*, the Court had found special circumstances in every case. *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring).

5. 372 U.S. 335 (1963). This decision expressly overruled *Betts*. *Id.* at 339.

6. See *United States v. Wade*, 388 U.S. 218, 223-27 (1967), for the Court's analysis of the expansion of the mandatory right to appointed counsel and its explanation of "critical stages."

7. See *Kirby v. Illinois*, 406 U.S. 682 (1972) (post-indictment lineups); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings prior to indictment); *Mempa v. Rhay*, 389 U.S. 128 (1967) (probation and parole revocation hearings); *United States v. Wade*, 388 U.S. 218 (1967) (pretrial lineups and showups); *In re Gault*, 387 U.S. 1 (1967) (juvenile proceedings which might result in commitment); *Miranda v. Arizona*, 384 U.S. 486 (1966) (custodial interrogations).

8. 407 U.S. 25 (1972).

9. The Court's holding in *Argersinger* has been refined in several recent decisions. See *Baldasar v. Illinois*, 446 U.S. 222 (1980) (an uncounseled misdemeanor conviction cannot convert a subsequent misdemeanor into a felony under an enhanced penalty statute); *Lewis v. United States*, 445 U.S. 55 (1980) (even though predicate felony conviction was uncounseled and subject to collateral attack on constitutional grounds, it could still be used for subsequent conviction

Paralleling these due process and right to counsel cases is another group of cases which relies on the equal protection clause of the fourteenth amendment¹⁰ in assuring the indigent defendant substantially equal treatment in the criminal justice system. In *Griffin v. Illinois*,¹¹ the Supreme Court held that equal protection requires that convicted indigents cannot be denied access to appellate review simply because they cannot afford the expense of trial transcripts. Consequently, states are obliged to furnish transcripts to indigents free of charge. Justice Black's plurality opinion enunciated a principle which has often been reiterated: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."¹² *Griffin* was followed by *Burns v. Ohio*,¹³ in which the Court held that a filing fee for an appeal cannot be required of an indigent. Then, on the same day that it announced *Gideon*, the Court in *Douglas v. California*¹⁴ affirmed the indigent's right to counsel for first appeals which by statute are granted as a matter of right. Using an equal protection analysis, the Court held that conditioning the appointment of counsel for an indigent's appeal on a preliminary showing of merit constitutes invidious discrimination against the indigent.

The cumulative effect of these decisions was that states and their local subunits confronted a substantial financial burden in underwriting the expenditures for appointed counsel.¹⁵ Moreover, in addition to appointed counsel, states were obliged to provide the needy defendant with a number of other ancillary services.¹⁶ In response to this ever-

under federal firearms statute); *Scott v. Illinois*, 440 U.S. 367 (1979) (as long as defendant is not sentenced to actual imprisonment, fact that imprisonment was a possible sentence does not invalidate uncounseled conviction).

10. U.S. CONST. amend. XIV, § 1 provides, in pertinent part:

[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

11. 351 U.S. 12 (1956).

12. *Id.* at 19.

13. 360 U.S. 252 (1959).

14. 372 U.S. 353 (1963). California provides appellants with a two-tiered appellate procedure: review by the intermediate appellate court is available to all defendants as a matter of right; the higher court only hears cases at its discretion. Before *Douglas* invalidated the procedure, needy appellants seeking appointment of counsel first had to demonstrate to the intermediate appellate court that their appeals were worthy *before* that court would provide them with an attorney. *Id.* at 354-55. As a result, unless such appointment was made, needy appellants were forced to appeal *pro se*.

15. See *James v. Strange*, 407 U.S. 128, 141 (1972).

16. See *State v. Fuller*, 12 Or. App. 152, 164-65, 504 P.2d 1393, 1399-1400 (1973) (Fort, J., dissenting) (investigators, psychiatrists and psychologists, handwriting and ballistics experts); Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632 (1970) (analysis of judicial and statutory rationale for providing supportive services); Note, *Right to Aid in Addition to Counsel for Indigent Criminal*

increasing drain on their treasuries, some jurisdictions began adopting and applying a variety of means of recovering some of the funds thus expended from those benefitted by the expenditures—the indigent criminal defendants themselves.

State reviewing courts, responding to these attempts with little guidance from the United States Supreme Court, wrestled with issues such as due process, equal protection and the “chill” of the right to counsel¹⁷ and reached divergent conclusions as to the constitutionality of recoupment schemes.¹⁸ In 1974, however, the Court decided *Fuller v. Oregon*¹⁹ and held constitutionally permissible a statute allowing recovery of appointed defense costs when imposed as a condition of probation. The Court indicated that its approval of the scheme was premised on the statute’s incorporation of a number of procedural safeguards, principally one allowing recoupment only when the defendant has been shown to have sufficient financial capacity to meet the repayment obligation.²⁰ The principal *Fuller* guideline was then acknowledged in most subsequent decisions of state and federal courts considering recoupment, and the presence or absence of a provision for determining the defendant’s ability to pay became the decisive factor in the validation or invalidation of the scheme under scrutiny. These decisions, however, in reviewing schemes different from the Oregon stat-

Defendants, 47 MINN. L. REV. 1054, 1055 (1963) (fees for expert witnesses, investigatory costs incurred in locating missing witnesses, accountants).

17. The “chill” doctrine was originally formulated in *United States v. Jackson*, 390 U.S. 570 (1968), where the Court invalidated a portion of the Federal Kidnapping Act which provided that the death penalty could be imposed only when the defendant chose to have a jury trial. Thus, the defendant’s right to a jury trial was held to have been “chilled” by the fact that he would be risking his life by exercising this right. The Court stated: “Whatever might be said of Congress’ objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is ‘incidental’ rather than intentional; the question is whether the effect is unnecessary and therefore excessive.” *Id.* at 582. A constitutional right, thus, is “chilled” when its exercise is inhibited by some factor which is “unnecessary” to the state’s objective. In the context of recoupment, the “chill” doctrine has been raised with reference to the discouraging effect that mere knowledge of possible recoupment can have on the defendant. *See In re Allen*, 71 Cal. 2d 388, 391, 455 P.2d 143, 144, 78 Cal. Rptr. 207, 208 (1969). The fact that the defendant plays no part in the initial fee arrangement may also discourage him from accepting appointed counsel. *See State ex rel. Brundage v. Eide*, 83 Wash. 2d 676, 681, 521 P.2d 706, 709 (1974). Knowing that it would be an additional expense for which he might be liable, the defendant might also be discouraged from requesting a jury trial. *See People v. Amor*, 12 Cal. 3d 20, 28, 523 P.2d 1173, 1177, 114 Cal. Rptr. 765, 769 (1974).

18. “Recoupment” in the context of this note refers only to the exacting of repayment from the defendant himself of some or all of the funds spent by the government in providing him with defense services. It is not to be confused with the equitable right of a defendant in a civil action to have certain amounts deducted from the plaintiff’s assessed award of damages for reasons arising from the same transaction. *See BLACK’S LAW DICTIONARY* 1146-47 (5th ed. 1979).

19. 417 U.S. 40 (1974).

20. *Id.* at 52-54.

ute approved in *Fuller*, often raised issues not addressed in *Fuller* and cast some doubt on the validity of the recoupment statute at issue.

Indeed, the arguable unfairness inherent in first affording a defendant the "right" to appointed counsel and then compelling him to pay for this "right" has met with sharp criticism.²¹ Besides their seeming oppressiveness, especially with respect to acquitted defendants, recoupment laws have been criticized for their inability to generate significant revenue, the rationale for their very existence.²² For these reasons, the continued adoption of such laws has been discouraged.²³ The justification for recoupment thus appears to be questionable unless the statutes themselves are made less oppressive or another legitimate objective for their enactment can be established. A purpose, perhaps, can be gleaned from the view that once a state decides to make a previously needy defendant financially liable for the exercise of a constitutional right, it should also grant him every advantage enjoyed by the nonindigent who normally must pay for that right. Such statutes, then, can become the foundation for providing the needy defendant with a better quality of defense and with a greater measure of choice and control with respect to this defense than he now generally has. The indigent defendant, like his paying counterpart, should be able to "retain" as well as discharge the attorney of his choice. In this way, regardless of the practical and ethical objections to recoupment, the practice can be turned from being merely a dubious means of meeting a state fiscal objective into an assurance to the needy defendant that the kind of trial he gets does *not* depend on the amount of money he has.

This note will first examine the responses of reviewing courts to various attempts at recoupment, focusing on the significant issues raised in those opinions. Present statutory recoupment schemes will then be examined and evaluated in light of these decisions. Finally, a model recoupment statute²⁴ will be suggested, one which both serves the state purpose of generating as much revenue as it reasonably can,

21. See, e.g., Note, *Recoupment Statutes: Free Defense—for a Price*, 53 J. URB. L. 89 (1975) [hereinafter cited as *Recoupment Statutes*].

22. See *James v. Strange*, 407 U.S. 128, 133-34 (1972); Note, *New Jersey's Public Defender Lien System: Burdening the Indigent*, 4 RUT.-CAM. L.J. 309, 317-18 (1973) [hereinafter cited as *Burdening the Indigent*].

23. See ABA, PROVIDING DEFENSE SERVICES § 6.4 (Approved Draft 1968): "Reimbursement of counsel or the organization or governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility."

24. A model recoupment statute was suggested before the development of the present case law on the subject in UNIFORM LAW COMMISSIONERS, MODEL DEFENSE OF NEEDY PERSONS ACT § 8 (1966). This model was subsequently adopted, with varying changes, by a number of states. See GA. CODE ANN. § 27-3211 (1978); IDAHO CODE § 19-858 (1979); N.M. STAT. ANN. § 31-16-7 (1978); VT. STAT. ANN. tit. 13, § 5255 (1974); WYO. STAT. § 7-1-114 (1977).

and also affords the indigent defendant maximum procedural protection while elevating him, as much as possible, to the position occupied by the nonindigent defendant with retained counsel.

THE JUDICIAL RESPONSE TO RECOUPMENT

The Early Split of Authority

Recoupment schemes have met with a variety of responses when subjected to judicial review, although the major legal issues raised—equal protection, due process and “chill” of the right to counsel—have appeared in most decisions in various permutations. Prior to the Supreme Court’s decision in *Fuller v. Oregon*,²⁵ which upheld a recoupment scheme and in so doing enunciated certain procedural safeguards which ensured its constitutionality, there was a clear split of authority with regard to the validity of such schemes. The majority position, at least initially, seemed to disfavor their use; however, a more sympathetic position soon emerged. As long as certain criteria were met, courts began showing a willingness to uphold such statutes. The Supreme Court, moreover, while striking down two recoupment statutes prior to *Fuller*, nevertheless in dicta left the door ajar for reasonable recoupment plans.²⁶

The first such scheme to be addressed was a New Jersey statute²⁷ which, though not actually providing for a recoupment of attorney’s fees, permitted the state to recover the cost of transcripts provided to convicted indigent appellants from their prison pay. The United States Supreme Court held in 1966 in *Rinaldi v. Yeager*²⁸ that by singling out for the reimbursement obligation only those unsuccessful appellants who happened to be imprisoned—those receiving probation or suspended sentences escaping such obligation—the statute violated the “rational relationship” standard of equal protection.²⁹ In dicta, how-

25. 417 U.S. 40 (1974). See text accompanying notes 65-81 *infra*.

26. *James v. Strange*, 407 U.S. 128, 141 (1972); *Rinaldi v. Yeager*, 384 U.S. 305, 311 (1966).

27. *Rinaldi v. Yeager*, 384 U.S. 305, 307 (1966), citing N.J. STAT. ANN. § 2A:152-18 (West Supp. 1964).

28. 384 U.S. 305 (1966).

29. The Warren Court used a two-tiered approach to equal protection: “strict scrutiny” was applied to statutes or regulations affecting “suspect” classifications or “fundamental interests” and required that the statute or regulation promote a compelling state interest and also be the least restrictive alternative available; minimal scrutiny, employing the “rational relationship” test, was applied in all other situations and merely required that the statute or regulation under review bear a rational relationship to a legitimate state interest. This latter approach was extremely deferential and rarely, at least until late in the Warren era, resulted in statutory invalidation. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Attempting to escape the rigid confines of this two-tiered analysis, the Burger Court has struggled with various formulations of intermediate levels of scru-

ever, the Court seemed to place its imprimatur on other, more equitable recoupment schemes: "We may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefitted from county expenditures."³⁰

State courts also considered the viability of recoupment attempts, the first being the Supreme Court of Iowa in *Woodbury County v. Anderson*,³¹ decided in January, 1969. Subsequent to the defendant's acquittal on a charge of rape and the payment of his court-appointed attorney from the local "court fund," the county sued to recover the amount expended relying on a statutory provision which permitted recovery of money spent "for the relief or support of a poor person."³² The trial court's reimbursement order was reversed by the supreme court which found the statute inapplicable for this purpose because of its vagueness.³³ In so holding, however, the court discounted the defendant's argument that any such recoupment was per se invalid: "It would be constitutionally permissible for the legislature to include a provision that expenditures made under this section be taxed as part of the costs against a defendant [who is] convicted This is a matter fundamentally for legislative, not judicial, treatment."³⁴

In June, 1969, the Supreme Court of California rejected the imposition of recoupment as a condition of probation in *In re Allen*,³⁵ the leading case in decisions critical of recoupment. The defendant was convicted of possession of a restricted dangerous drug and sentenced to probation, one condition of which was that she reimburse the county for her court-appointed counsel. Although the California Penal Code did not contain a specific provision for such a condition, it was imposed through the probation statute's "omnibus" clause which permitted the

tiny and has succeeded in establishing such a test in the area of sex discrimination. The Court has held that "classifications by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976) (emphasis added). See also 60 CORNELL L. REV. 670, 671 n.6 (1975), where the author suggests that the Court's tolerant attitude toward recoupment statutes is a reflection of its sense of responsibility for imposing on the states the burden of defending the indigent.

30. 384 U.S. at 309. An additional argument had been raised that the scheme "chilled" the appellant's right to appeal by its imposition of the reimbursement requirement; however, the Court avoided the issue. *Id.* at 307-08.

31. 164 N.W.2d 129 (Iowa 1969).

32. *Id.* at 131, citing IOWA CODE ANN. § 252.13 (West 1966).

33. The court relied on the United States Supreme Court's decision in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). *Giaccio* invalidated an 1860 Pennsylvania statute which permitted the imposition of costs on both convicted and acquitted defendants on the grounds that it created a denial of due process. The statute's vagueness and absence of standards did not enable defendants to protect themselves from an arbitrary and discriminatory application.

34. 164 N.W.2d at 133-34.

35. 71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969).

court to set "other reasonable conditions"³⁶ to the granting of probation. The state supreme court found that such a condition was "an impediment to the free exercise of a right guaranteed by the Sixth Amendment."³⁷ Since the practice of imposing such conditions was becoming more common, the court reasoned that the knowledge of this practice might lead some needy defendants to conclude that the court's offer of "free" counsel is a deception: "This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation"³⁸ The court also noted the "chill" created by the poor bargaining position of the indigent defendant with respect to his appointed counsel. Although he may well be required to pay, the indigent defendant is not a party to a determination of the amount he may be charged and, in effect, must underwrite a "blank check" for his defense services.³⁹

In August, 1969, the Supreme Court of New Hampshire in *Opinion of the Justices*⁴⁰ considered a proviso to an appropriation of funds for payment of court-appointed counsel which required partial repayment from indigents of any amounts spent.⁴¹ The court did not reach the question of whether the proviso offended the federal Constitution, finding instead that it violated the state constitution which specifically provided for the "right to counsel at the expense of the state if need is shown."⁴² The court remarked, however, that although it may have been difficult to draft constitutional reimbursement provisions, such provisions are not inherently "illogical."⁴³ The court observed that if the proviso had been addressed at only those defendants who were capable of repayment, it would not have conflicted with the state constitution.⁴⁴ Thus, this was the first judicial mention of the defendant's ability to pay, a factor which later was to become crucial to any consideration of recoupment.

In 1971, the United States District Court for the District of Kansas

36. *Id.* at 390, 455 P.2d at 143-44, 78 Cal. Rptr. at 207-08 (emphasis omitted), citing CAL. PENAL CODE § 1203.1 (West 1969). See note 131 *infra* for other examples of "omnibus" provisions.

37. 71 Cal. 2d at 392, 455 P.2d at 145, 78 Cal. Rptr. at 209.

38. *Id.* at 391, 455 P.2d at 144, 78 Cal. Rptr. at 208.

39. *Id.* at 393, 455 P.2d at 146, 78 Cal. Rptr. at 210.

40. 109 N.H. 508, 256 A.2d 500 (1969).

41. The proviso, added as a footnote to the appropriation, required repayment of 10% of any amounts spent, with a minimum repayment of \$5 and a maximum of \$20. *Id.* at 510, 256 A.2d at 501-02.

42. *Id.* at 512, 256 A.2d at 502, quoting N.H. CONST. art. 15, part I.

43. *Id.* at 511, 256 A.2d at 502.

44. *Id.* at 512, 256 A.2d at 502.

in *Strange v. James*⁴⁵ considered a full-fledged recoupment statute which provided for recovery of court-appointed defense costs from all defendants, acquitted or convicted. The defendant was determined indigent by the trial court and pleaded guilty to a charge of pocket picking. The Kansas Judicial Administrator, pursuant to the statute, requested the defendant to repay the state within sixty days or a judgment in the amount of the fee would be entered against him.⁴⁶ In its opinion, the district court focused on the violation of the sixth amendment right to the assistance of counsel and, in forthright language, it expressed no doubts that the statute "returns the indigent accused to the lawyerless position he occupied prior to the decision in *Gideon v. Wainwright*."⁴⁷ The "unnecessary" nature of the recoupment discouraged indigents from exercising their constitutional right and therefore had a "chilling" effect on this right.⁴⁸ Moreover, the very specificity of the statute rendered it incapable of any narrow construction which might have made it constitutional.⁴⁹

On review by writ of certiorari, the United States Supreme Court affirmed the district court's invalidation of the Kansas recoupment statute.⁵⁰ Without reaching the sixth amendment question, however, the Court found the statute invalid on equal protection grounds. It held that, in requiring the indigent defendant to reimburse the state for his court-appointed counsel, the statute failed to accord him all of the protective exemptions available to other civil judgment debtors⁵¹ and thus offended the equal protection clause. The Court, as it did in *Rinaldi*, applied the deferential "rational relationship" standard in its analysis.⁵² The Court noted the wide variety of state recoupment laws and declined to make "any broadside pronouncement on their general validity."⁵³ Indeed, the Court went on to enumerate objectives furthered

45. 323 F. Supp. 1230 (D. Kan. 1971), *aff'd*, 407 U.S. 128 (1972).

46. *Id.* at 1231.

47. *Id.* at 1232.

48. *Id.* at 1232-33. The court reviewed the "chill" doctrine as it was expressed in *United States v. Jackson*, 390 U.S. 570 (1968). See note 17 *supra* for a discussion of how recoupment may be "unnecessary."

49. 323 F. Supp. at 1232.

50. *James v. Strange*, 407 U.S. 128 (1972).

51. The exemptions accorded civil judgment debtors in Kansas (but not to those subject to the recoupment statute) include restrictions on the amount of income subject to garnishment, restrictions on garnishment at times of personal or family illness, and exemption from attachment and execution on the debtor's clothing, books, furnishings, tools of trade, food, means of transportation and pension funds. *Id.* at 135. Conversely, a homestead exemption was the only one specifically accorded the recoupment debtor. KAN. STAT. ANN. § 22-4513 (Supp. 1971).

52. 407 U.S. at 140-41. See note 29 *supra*.

53. 407 U.S. at 133.

by recoupment laws,⁵⁴ concluding "that state recoupment statutes may betoken legitimate state interests."⁵⁵ Although the Court thus signalled to state legislatures that it might well approve recoupment statutes in the future provided that they were drafted more fairly, it failed to articulate the standards it might require such statutes to meet.

The Court of Appeals of North Carolina became the first court to uphold a recoupment scheme in *State v. Foust*.⁵⁶ The defendant was given a suspended sentence and placed on probation on the condition that he repay the state for the amount spent for his court-appointed attorney. The defendant failed to make payments and probation was revoked. Rejecting the "chill" argument of *In re Allen*, the North Carolina court compared the position of the indigent defendant with that of the nonindigent:

That nonindigents may be discouraged from engaging counsel by the fact they are required to pay does not mean that the State must provide them free counsel, or that a reluctance on their part to incur cost of counsel unconstitutionally impedes their right under the Sixth Amendment. We know of no reason, and none has been suggested to us, why indigents should be placed in a preferred position by being relieved of choices that naturally arise to all defendants.⁵⁷

Although the court held the recoupment scheme generally to be valid, it held that revoking probation simply because of nonpayment was not.⁵⁸ An inquiry into the probationer's ability to pay must first be conducted in order to determine whether the failure to pay had been willful or without lawful excuse.⁵⁹ The court thus was not only the first to approve a recoupment scheme, but was also the first to apply the ability to pay standard as the test of its validity.

54. The Court stated:

Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution. Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs. Finally, federal dominance of the Nation's major revenue sources has encouraged state and local governments to seek new methods of conserving public funds, not only through the recoupment of indigents' counsel fees but of other forms of public assistance as well.

Id. at 141 (footnotes omitted).

55. *Id.*

56. 13 N.C. App. 382, 185 S.E.2d 718 (1972).

57. *Id.* at 384, 185 S.E.2d at 720.

58. *Id.* at 387, 185 S.E.2d at 722.

59. *Id.* This aspect of *Foust* was later overruled when the same court held that the burden of proof was on the defendant to establish his inability to pay; otherwise, mere nonpayment could justify the presumption of bad faith. *State v. Young*, 21 N.C. App. 316, 204 S.E.2d 185 (1974). This more uncompromising standard was reviewed in light of *Fuller* by one writer who suggested that the North Carolina recoupment system is on infirm constitutional ground. See 11 WAKE FOREST L. REV. 490 (1975).

A year later, in 1973, the Supreme Court of Wisconsin in *State v. Gerard*⁶⁰ extended the *Foust* rationale and found that reimbursement as a condition of probation was constitutionally valid. In *Gerard*, as in *Foust*, the condition had been applied pursuant to an "omnibus" clause. The defendant had argued that the knowledge that such a condition might be applied "chilled" his right to counsel and also induced his waiver of a jury trial. The court responded that the condition was constitutional because it was discretionary to begin with and was subject to reexamination during the term of probation, with the reviewing court considering the probationer's continuing capacity to pay.⁶¹

The growing trend toward validating recoupment schemes, so long as certain procedural requirements were satisfied, gained impetus in *State v. Fuller*,⁶² where the Court of Appeals of Oregon upheld a statute which conditioned probation on the recoupment of appointed counsel fees as part of costs specially incurred by the state in prosecuting the defendant.⁶³ The court held that the statute offended neither the right to counsel nor the equal protection clause because the statute provided that the repayment condition could only be imposed on those convicted defendants with the continuing ability to pay and because the probationer is not denied any of the protective exemptions available to other judgment debtors in the state.⁶⁴

Fuller v. Oregon

Although the Oregon Supreme Court declined to review the decision in *State v. Fuller*, the United States Supreme Court granted certiorari and, in *Fuller v. Oregon*,⁶⁵ upheld the Oregon statute in what has since become the touchstone opinion regarding recoupment laws.⁶⁶ The Court evidently interceded to lend its great authority to settle, for the time being at least, the growing dichotomy in the case law.⁶⁷ Cases following *In re Allen* had held that recoupment schemes exercised an impermissible "chill" on the sixth amendment right to counsel, while several more recent cases had found such schemes permissible, pro-

60. 57 Wis. 2d 611, 205 N.W.2d 374, *appeal dismissed*, 414 U.S. 804 (1973).

61. *Id.* at 625-27, 205 N.W.2d at 382-83.

62. 12 Or. App. 152, 504 P.2d 1393 (1973) (2-1 decision).

63. *Id.* at 157, 504 P.2d at 1396.

64. *Id.* at 158-59, 504 P.2d at 1396-97.

65. 417 U.S. 40 (1974).

66. *See, e.g.*, *Olson v. James*, 603 F.2d 150, 154-55 (10th Cir. 1979); *State v. Miller*, 111 Ariz. 558, 559, 535 P.2d 15, 16 (1975); *State v. Barklind*, 87 Wash. 2d 814, 817-18, 557 P.2d 314, 317-18 (1976).

67. The Court specifically noted "the importance of the question presented and the conflict of opinion on the constitutional issue involved." 417 U.S. at 42.

vided that the crucial element of the defendant's ability to pay was taken into consideration. The Court in *Fuller* rejected *Allen* and aligned itself with the more recent trend.⁶⁸

In the six-justice majority opinion written by Justice Stewart, the Court first rejected the defendant's claim that equal protection was violated "because of various classifications explicitly or implicitly drawn by the legislative provisions,"⁶⁹ an argument which the Court had accepted in *James v. Strange*.⁷⁰ The Court said that the Oregon statute, unlike that invalidated in *James*, provided the defendant with all exemptions available to other judgment debtors.⁷¹ A second equal protection challenge focused on the distinction between convicted defendants and those acquitted or whose convictions were reversed on appeal. The Court deemed this classification noninvidious and rationally related to the state's purpose of sparing an acquitted defendant or one whose conviction was reversed from further imposition by the state.⁷² The final challenge to the statute was that it "chilled" the defendant's right to counsel because, knowing that he may remain under an obligation to pay for his defense services, the defendant might be reluctant to accept appointed counsel. The Court quickly dismissed the "chill" argument articulated in *Allen* as "wide of the constitutional mark."⁷³ It reasoned that the defendant is in no way denied his right to the assistance of counsel, and the knowledge that he may later be required to pay for it has no effect on his eligibility for appointed counsel.⁷⁴ The Court sustained the Oregon statute because it was carefully drawn "to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship."⁷⁵

The carefully-tailored safeguards of the Oregon statute which the Court approved and which are cited with some regularity in subsequent lower court decisions are:⁷⁶ (1) that repayment is never mandatory; (2) that only convicted defendants can be subject to a recoupment obligation; (3) that repayment must be conditioned on the

68. *Id.* at 51-52.

69. *Id.* at 48.

70. 407 U.S. 128 (1972).

71. 417 U.S. at 47.

72. *Id.* at 49-50. The Court thus continued to apply the deferential "rational relationship" standard for evaluating recoupment schemes. See note 29 *supra*.

73. 417 U.S. at 52.

74. *Id.* at 52-53. Criticism has been leveled at *Fuller* for its apparent equating of "chill" with "total denial" of the sixth amendment right. See 60 CORNELL L. REV. 670, 679-83 (1975).

75. 417 U.S. at 54.

76. See text accompanying notes 82-128 *infra*.

defendant's ability to pay; (4) that the defendant may petition the court at any time for remission of the repayment and the court may remit such costs if repayment imposes a manifest hardship on the defendant or his family; and (5) that no convicted person can be held in contempt if his failure to repay was not due to an intentional refusal to do so.⁷⁷

Justice Douglas' concurring opinion focused on the narrow construction of the recoupment statute which he said eliminated the "chill" argument:

Under these circumstances, the "chill" on the exercise of the right to counsel is no greater than that imposed on a nonindigent defendant without great sums of money. Even though such a defendant can afford counsel, he might well be more ready to accept free appointed counsel than to retain counsel himself. Yet a State is not therefore required by the Federal Constitution to provide appointed counsel for nonindigent defendants.⁷⁸

Justice Marshall's dissent, joined by Justice Brennan, maintained that the statute offended equal protection in that, unlike other debtors, the probationer who is required to reimburse the state can be sent to prison for his failure to make payments.⁷⁹ By contrast, a nonindigent probationer who has defaulted on a payment to his retained attorney cannot be imprisoned.⁸⁰ The majority rejected this analysis, reasoning that revocation of probation is not a "collection device" but a sanction imposed for the willful refusal to comply with a court order. The Court further noted that because such an order can be entered only when the probationer has the proven ability to pay, but has refused to do so, the equal protection defect noted in *James* does not apply.⁸¹

Beyond Fuller

In the wake of *Fuller*, courts were forced to consider the standards for recoupment schemes which the decision set. Decisions of the Supreme Court of Washington both before and after *Fuller* illustrate the impact of the case. Decided less than a month before *Fuller*, *State ex rel. Brundage v. Eide*⁸² reviewed a trial court order directing an indi-

77. 417 U.S. at 44-46. Hereinafter, the terms "*Fuller* safeguards" or "*Fuller* guidelines" refer to these features of the Oregon statute which were approved by the Court.

78. *Id.* at 56 (Douglas, J., concurring). This echoes the North Carolina court's rationale in *Foust*. See 13 N.C. App. 382, 384, 185 S.E.2d 718, 720 (1972). See also text accompanying notes 56-59 *supra*.

79. 417 U.S. at 59-60 (Marshall, J., dissenting).

80. *Id.* at 61.

81. *Id.* at 48 n.9. The Court relegated its brief reply to the dissent to a footnote, reasoning that it did not have to address the argument because it had not been brought up below and was therefore not properly before the Court. *Id.*

82. 83 Wash. 2d 676, 521 P.2d 706 (1974).

gent, at the time of his arraignment, to repay his appointed counsel fees within six months of the arraignment if such repayment was not financially burdensome. Relying on *In re Allen*, the supreme court held that such an order, imposed without reference to an authorizing statute, "chilled" the exercise of the indigent's right to counsel.⁸³ Furthermore, the absence of any standards sufficient to permit the defendant to protect himself from an arbitrary imposition of repayment invalidated the order on due process grounds.⁸⁴ Thus, despite the fact that the defendant's ability to pay would presumably be taken into account before the final imposition of the order, the recoupment attempt was struck down. In *State v. Hess*,⁸⁵ decided after *Fuller*, the same court invalidated a lower court order that a convicted defendant pay the costs of his court-appointed defense as a condition of probation. The court reviewed the *Fuller*-approved safeguards and held that since such safeguards were neither present in the "omnibus" clause under which the condition was imposed nor were followed by the imposing court, the repayment condition was invalid.⁸⁶ Conversely, the Washington court in *State v. Barklind*⁸⁷ upheld a recoupment probation condition because it meticulously complied with all the *Fuller* guidelines, even though imposed by the court pursuant to an "omnibus" clause.

As was true of the cases preceding *Fuller*, the principal arguments raised in the cases after *Fuller* against recoupment were based on purported due process, equal protection and right to counsel violations, often interdependently bound together. However, these constitutional requirements were generally deemed to have been satisfied where the defendant's ability to pay was considered before imposition of a repayment obligation.

The Supreme Court of California, whose decision in *Allen* was the standard for recoupment invalidation, was confronted with a series of challenges to a newly-enacted recoupment statute in *People v. Amor*.⁸⁸

83. *Id.* at 680-81, 521 P.2d at 709. This "chill" can be due to both the defendant's knowledge that recoupment might take place and also his uncertainty as to the extent of his liability because he is not a party to setting the amount of compensation. *Id.*

84. *Id.* at 681, 521 P.2d at 709.

85. 86 Wash. 2d 51, 541 P.2d 1222 (1975).

86. *Id.* at 53-54, 541 P.2d at 1223-24. See text accompanying note 77 *supra* for the five *Fuller* safeguards accepted in *Hess*.

87. 87 Wash. 2d 814, 557 P.2d 314 (1977) (5-4 decision). The court noted that a statute similar to that upheld in *Fuller* had been passed by the state legislature during the time between the imposition of the probation condition and the announcement of the court's decision. Because the court did not wish to render the new statute invalid, it declined to impose a higher constitutional standard than that announced in *Fuller*. *Id.* at 818, 557 P.2d at 318.

88. 12 Cal. 3d 20, 523 P.2d 1173, 114 Cal. Rptr. 765 (1974). The California statute provided for recovery of defense fees from all defendants with appointed counsel so long as the court found

The defendant had argued that the trial court's imposition of a repayment order "chilled" her right to counsel. Without actually overruling *Allen*, the court carefully distinguished its earlier decision on the grounds that in *Allen* the defendant was not given prior notice of possible recoupment, was liable for the entire fee without a finding that she had the ability to pay and could be imprisoned for nonpayment. Conversely, in *Amor* the defendant was given prior notice, was ordered to pay only that portion of the fee which the court had determined her capable of paying, and, because execution was only issuable as a civil judgment, not as contempt, she could not be imprisoned for nonpayment.⁸⁹

Amor also considered a related "chill" argument: the defendant, knowing that she may have to pay for her defense, might be reluctant to incur the additional expense of a jury trial. The court found that the argument would have been more persuasive with respect to nonindigent defendants with limited means who *must* pay the full amount of their defense costs than for indigent defendants who *may* be required to pay for only a portion of such costs.⁹⁰ Moreover, the court stated that some burden on the exercise of a constitutional right is permissible and that only an "excessive" burden is not. The court found that the defendant had failed to establish an "excessive" burden.⁹¹

The defendant had also raised a two-pronged due process challenge against the statute. First, she had argued that acquitted defendants were denied due process by being punished, in effect, with the repayment liability. The court asserted, however, that a mere obligation to repay based on financial ability is not punishment.⁹² A second challenge, that the defendant was deprived of property without due process, was also discounted: while not expressly provided for by the statute, notice was in fact given the defendant and is implicit in the statute's several procedural safeguards.⁹³

them able to pay for all or part of such fees and in installments compatible with their financial ability; execution of the debt could only be issued as a civil judgment and nonpayment could not be enforced by contempt. CAL. PENAL CODE § 987.8 (West Supp. 1973-1974).

89. 12 Cal. 3d at 25-26, 523 P.2d at 1176, 114 Cal. Rptr. at 768.

90. *Id.* at 28, 523 P.2d at 1177, 114 Cal. Rptr. at 769.

91. *Id.*

92. *Id.* at 28-29, 523 P.2d at 1178, 114 Cal. Rptr. at 770. The court also noted that the defendant, who had been convicted, had no standing to make this argument. *Id.*

93. *Id.* at 29, 523 P.2d at 1178-79, 114 Cal. Rptr. at 770-71. The current version of the recoupment statute incorporates a prior notice provision. CAL. PENAL CODE § 987.8(b) (West Supp. 1979-1980). As for the other arguments raised by the defendant, the court quickly rejected a claim that the statute was invalid because it did not allow for a trial by jury to determine the amount of the defendant's financial liability. 12 Cal. 3d at 30-31, 523 P.2d at 1179-80, 114 Cal. Rptr. at 771-72. The court also dismissed an equal protection challenge by noting that the statute properly

In *Wicks v. City of Charlottesville*,⁹⁴ the Supreme Court of Virginia sustained a statute permitting the recovery of court-appointed counsel fees as part of the taxed costs of prosecution, rejecting an argument that the statute "chilled" the defendant's right to counsel. The court noted that prior to his conviction the defendant had requested the appointment of counsel and had completed an affidavit of indigency. Therefore, there was no "chill" in fact and consequently the defendant could not later assert the constitutional violation.⁹⁵ The court observed that although the right to appointed counsel is guaranteed to indigents, no court to date had held "that every constitutional right or privilege should be available to all persons without any cost or obligation on their part. Free legal service for all may be the ultimate, but if so it must come by legislation, or from some source other than by judicial fiat of this court."⁹⁶

The Appellate Division of the Superior Court of New Jersey sustained that state's Public Defender Act⁹⁷ in *Stroinski v. Office of Public Defender*⁹⁸ in the face of a constitutional challenge, liberally construing the statute's questionable provisions. The court held that the statute does not create a "chilling" effect on the right to counsel because according to the statute the defendant is under no obligation to repay unless he is in fact capable of so doing and, even then, such repayment would be in amounts that he could reasonably be expected to pay.⁹⁹ Equal protection is satisfied because the indigent has all the protective exemptions available to other civil judgment debtors.¹⁰⁰ Due process is satisfied despite the fact that the defendant is not given prior notice of the statute's lien provision. As construed by the court, the statute not only gives the indigent adequate notice of the lien at the time of its filing but also affords him the opportunity later to contest the amount of the lien and its enforcement.¹⁰¹ Moreover, the defendant is not mis-

provided for equivalence between defendant-debtors and other judgment debtors. *Id.* at 31-32, 523 P.2d at 1180, 114 Cal. Rptr. at 772.

94. 215 Va. 274, 208 S.E.2d 752 (1974), *cert. denied*, 421 U.S. 901 (1975).

95. *Id.* at 280, 208 S.E.2d at 757.

96. *Id.*

97. N.J. STAT. ANN. §§ 2A:158A-1 to 25 (West 1971). The statute requires that a lien be filed against present or after-acquired property of a publicly-defended indigent when the value of the services rendered exceeds \$150, with such lien remaining subject to execution for 10 years unless discharged earlier. *Id.* §§ 2A:158A-16 to 17.

98. 134 N.J. Super. 21, 338 A.2d 202 (1975). In an article published before the decision, the recoupment statute and especially its relentless lien provision were criticized for a number of constitutional defects, all of them mentioned but found inapplicable by the court. *See Burdening the Indigent*, *supra* note 22.

99. 134 N.J. Super. at 34, 338 A.2d at 209.

100. *Id.* at 35, 338 A.2d at 209.

101. *Id.* at 37-38, 338 A.2d at 210-11.

led by being informed at his arraignment of his right to "free" counsel. He is, "in fact, provided with counsel without cost. So long as he remains indigent, there is no cost to him. It is only when he is deemed financially able to pay that he is responsible therefor."¹⁰²

In *Commonwealth v. Opara*,¹⁰³ the Superior Court of Pennsylvania held that the defendant's sixth amendment right to counsel had been "chilled" by the failure of the trial court to observe certain due process requirements in its imposition of a repayment order.¹⁰⁴ The court observed that "[w]here neither the order nor the proceeding out of which it arose contains assurance that only those able to repay will ever be required to there is a real danger that some may choose to forego their right to appointed counsel."¹⁰⁵ The *Opara* court indicated that a valid recoupment statute must include the procedural safeguards approved in *Fuller*, i.e., a hearing to determine the defendant's ability to pay, a right to petition the court for remission of all or a portion of the amount due after imposition of the repayment order and immunity from contempt action for nonpayment without a prior determination that nonpayment was the result of bad faith or an intentional refusal to pay.¹⁰⁶ In addition, the court noted that due process mandates that the defendant be given both prior notice of the potential recoupment obligation as well as some sort of accounting of his appointed defense costs.¹⁰⁷

Although the United States Supreme Court did not consider the defendant's due process or "chill" of the right to counsel arguments in its equal protection invalidation of the Kansas recoupment statute in *James v. Strange*,¹⁰⁸ a revised Kansas statute¹⁰⁹ was later challenged on these grounds. In *State v. Keener*,¹¹⁰ this revamped scheme was upheld

102. *Id.* at 38, 338 A.2d at 211.

103. 240 Pa. Super. 511, 362 A.2d 305 (1976).

104. The trial court, unable to apply any specific recoupment statute, nevertheless purported to find "derivative authority" for its recoupment order in a portion of the Motor Vehicle Code which provided for fines of \$100 to \$500. Although the superior court held the reimbursement imposition invalid because it exceeded statutory authority, it went on to consider the due process and right to counsel arguments. *Id.* at 518-19, 362 A.2d at 308.

105. *Id.* at 527, 362 A.2d at 313.

106. *Id.* at 518-21, 362 A.2d at 310-11.

107. *Id.*

108. 407 U.S. 128 (1972). See also text accompanying notes 50-55 *supra*.

109. KAN. STAT. ANN. § 22-4513 (Supp. 1978). After *James*, the statute was amended to provide the defendant-debtor all exemptions accorded other civil judgment debtors. All other provisions otherwise remained unchanged: the defendant, whether convicted or acquitted, was sent notice by certified mail that the amount spent on his behalf for court-appointed counsel would be due in 60 days or the expenditure would become a judgment bearing six percent interest, and that such judgment becomes a lien on real estate and is subject to execution or garnishment.

110. 224 Kan. 100, 577 P.2d 1182 (1978).

by the Supreme Court of Kansas in the face of a due process challenge which argued that the statute provided neither notice nor a hearing with regard to the recoupment obligation. The court, finding considerable constitutional protection not explicitly provided in the statute, held that the notice requirement was satisfied by the notice of the debt for legal services sent the defendant by certified mail, even though this was not done until *after* the debt had accrued. Furthermore, a right to object to the debt was implicit in the waiting period which followed the notice, and a hearing on the validity of the judgment took place when the state attempted to collect by execution or garnishment.¹¹¹

In 1979, a class action suit challenged the same Kansas statute in federal district court where, in *Simmons v. James*,¹¹² it was deemed unconstitutional on equal protection and "chill" of the right to counsel grounds. Closely following the *Fuller* guidelines, the court held that the fatal flaw in the statute was its disregard of the defendant's ability to pay.¹¹³ While the state argued that a "reasonableness" standard should be read into the statute to render it constitutional (as the state court had done in *Keener*), the federal district court found the statute too specific on its face to permit any alternate construction.¹¹⁴ The United States Court of Appeals for the Tenth Circuit subsequently adopted the *Simmons* reasoning in *Olson v. James*,¹¹⁵ finding the statute unconstitutional under the fourteenth amendment. Without reaching the sixth amendment issue, the court remarked that it "need only take notice of its [the statute's] awesome and forbidding character to realize that it emphasizes collection first and foremost."¹¹⁶ By way of contrast, the Oregon law in *Fuller* was seen to have survived constitutional attack because of its "nonoppressiveness" and "basic reasonable-

111. *Id.* at 103-04, 577 P.2d at 1185. Of the post-*Fuller* cases reviewed in this note, *Keener* is the only one which does not mention *Fuller*.

112. 467 F. Supp. 1068 (D. Kan. 1979).

113. *Id.* at 1075-78. In this regard, the district court observed:

Every significant case located by this Court which has discussed *Fuller* notes that the *Fuller* opinion emphasized that the Oregon recoupment law considered a defendant's ability to pay. . . .

We believe that a very strong argument can be made that the Kansas law's failure to take into account ability to pay needlessly chills the right to counsel.

Id. at 1075 (emphasis in original). As early as 1972—before *Fuller*—a perceptive student writer found the Kansas statute's failure to take ability to pay into account to be the crucial flaw in the scheme, one which could be remedied simply by adding such a provision. *See* 20 U. KAN. L. REV. 344, 350 (1972) [hereinafter cited as KANSAS].

114. 467 F. Supp. at 1079. Although the decision did not reach the due process issue raised by the defendant, the court remarked that the due process "protections" read into the law by the Kansas court in *Keener* were not present either in the statute or in actual practice. *Id.* at 1080.

115. 603 F.2d 150 (10th Cir. 1979). The case was consolidated with another unpublished district court case which had found the statute constitutional. *Id.* at 151-52.

116. *Id.* at 155.

ness."¹¹⁷

Most recently, the Supreme Court of Illinois in *People v. Cook*,¹¹⁸ invalidated a statute which permitted the trial court to recoup funds expended for appointed counsel from the defendant's bail deposit. Although the statute appeared discretionary by providing that the deposit "may" be used in this way, it offered no guidance to the court with regard to its application.¹¹⁹ The supreme court, relying principally on *Rinaldi v. Yeager*,¹²⁰ held that the statute violated equal protection by singling out only those defendants who had posted bail while exempting those not posting bail. The court found no "rational relationship" between the legislative purpose of recoupment and a statute which imposed liability on only one segment of a class of indigents.¹²¹ Furthermore, the guarantees of due process and the right to counsel had been violated by the statute's lack of a provision for examining the defendant's present or future ability to pay.¹²²

State and federal courts, relying on *Fuller*, have come to consider "ability to pay" as the essential touchstone of recoupment validity. In *State v. Miller*,¹²³ the Arizona Supreme Court upheld a probation condition requiring repayment of defense costs on the grounds that the trial court had properly considered the defendant's ability to pay. The South Dakota Supreme Court, in *White Eagle v. State*,¹²⁴ noted that, although not all of the *Fuller* safeguards had been incorporated into the

117. *Id.* at 154.

118. 81 Ill. 2d 176, 407 N.E.2d 56 (1980).

119. Code of Criminal Procedure of 1963, ILL. REV. STAT. ch. 38, § 110-7(g) (1979). The statute seemed to presume that mere posting of bail indicates the ability to pay for counsel, a presumption generally criticized, since in many instances bail money is either borrowed or posted by friends or relatives. See, e.g., *United States v. Bursey*, 515 F.2d 1228 (5th Cir. 1975). See generally S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES 322-23 (1976) [hereinafter cited as KRANTZ & SMITH]; Kamisar & Choper, *The Right to Counsel in Minnesota—Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 28-33 (1963) [hereinafter cited as Kamisar & Choper].

120. 384 U.S. 305 (1966). See text accompanying notes 27-30 *supra*.

121. 81 Ill. 2d at 183, 407 N.E.2d at 60. In applying the "rational relationship" test to the Illinois statute, the court followed the deferential stance of the United States Supreme Court with regard to recoupment. See note 29 *supra*.

122. 81 Ill. 2d at 186, 407 N.E.2d at 61.

123. 111 Ariz. 558, 535 P.2d 15 (1975).

124. 280 N.W.2d 659 (S.D. Sup. Ct. 1979). The South Dakota statute reads as follows:

Whenever the court finds that funds are available for payment from or on behalf of a defendant to carry out, in whole or in part, the provisions of this chapter, the court may order that the funds be paid, as court costs or as a condition of probation, to the court for deposit with the county treasurer, to be placed in the county general fund or in the public defender fund in those counties establishing such an office pursuant to subdivision (1) of § 23A-40-7 as a reimbursement to the county to carry out the provisions of this section. Such reimbursement shall be a credit against any lien created by the provisions of this chapter against the property of the defendant.

S.D. CODIFIED LAWS ANN. § 23A-40-10 (Supp. 1980). It is evident that although the statute pro-

state statute providing for recoupment as a condition of probation, the "essential protection," the conditioning of the obligation on the probationer's ability to pay, rendered the statute valid. In *United States v. Bracewell*,¹²⁵ the United States Court of Appeals for the Second Circuit reversed and remanded a case for a finding of "availability for payment" of funds seized from the defendant at the time of his arrest. The court held that, though not specified in the federal recoupment statute,¹²⁶ an inquiry into the defendant's personal and familial financial situation was mandated by *Fuller*, and the funds could not be appropriated unless a prior determination had been made that such recoupment would not impose a hardship on the defendant.¹²⁷

In retrospect, *Fuller* developed some relatively clear guidelines for recoupment plans, despite criticisms leveled at the decision. While the Oregon statute under review contained a number of procedural safeguards which the Court approved, the preeminent provision cited most frequently in subsequent lower court decisions (and equally crucial in those upholding recoupment schemes before *Fuller*¹²⁸) is the requirement that the defendant's ability to pay be considered before any imposition of reimbursement. Without exception, where such ability had been initially considered, the statute or court order imposing repayment was upheld; where ability to pay had been disregarded, the statute or court order was struck down.

VARIETIES OF RECOUPMENT SCHEMES

A number of approaches to recouping court-appointed defense costs have been used by various jurisdictions. Such a variety exists, in fact, that the Supreme Court in *James v. Strange* expressly limited its holding to the statute under review because of a reluctance to make any

vides for a consideration of ability to pay, it does not provide a remission procedure or for excuse if failure to pay is not intentional.

125. 569 F.2d 1194 (2d Cir. 1978).

126. The statute provides:

Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

18 U.S.C. § 3006A(f) (1976).

127. 569 F.2d at 1199.

128. See *State v. Foust*, 13 N.C. App. 382, 185 S.E.2d 718 (1972); *State v. Fuller*, 12 Or. App. 152, 504 P.2d 1393 (1973); *State v. Gerard*, 57 Wis. 2d 611, 205 N.W.2d 374 (1973).

"broadside pronouncement" on the validity of all such laws.¹²⁹

The most prevalent form of recoupment is that of a condition of probation.¹³⁰ Such a condition can be imposed either through an "omnibus" clause in a probation statute¹³¹ or through a specific provision in either a probation statute¹³² or a general recoupment statute.¹³³ Many of the decisions regarding recoupment have reviewed such conditions, including *Fuller*. Besides the Oregon statute,¹³⁴ however, only six of the statutes containing provisions for recoupment as a condition of probation provide for a determination of the defendant's financial circumstances.¹³⁵

A second form that recoupment can take is that of a statute requiring repayment from those defendants who were determined, either during or at the conclusion of court proceedings against them, to have had the financial ability to pay for part¹³⁶ or all¹³⁷ of their court-appointed defense at the time they received this defense. Under such a statute, liability for repayment cannot be extended to include any assessment of ability to pay which occurs after such services have terminated. In most jurisdictions having such laws, recoupment is generally permitted in varying degrees from partially indigent defendants as well as from

129. 407 U.S. at 133.

130. For a thorough discussion of the origin, theory and prevalence of this aspect of recoupment, see Comment, *Reimbursement of Defense Costs as a Condition of Probation for Indigents*, 67 MICH. L. REV. 1404 (1969) [hereinafter cited as *Reimbursement*]. See also Annot., 79 A.L.R.3d 1025 (1977).

131. Most probation legislation contains such a provision, which permits the court to impose probation conditions liberally which are otherwise unspecified. See, e.g., 18 U.S.C. § 3651 (1976) (probation permitted "for such periods and upon such terms and conditions as the court deems best"); DEL. CODE ANN. tit. 11, § 4104(3) (1979) (fine or costs may be imposed as condition of probation); MISS. CODE ANN. § 47-7-35 (1972) (court may add "the following or any other" condition).

132. KAN. STAT. ANN. § 21-4610(3)(k) (Supp. 1979); LA. CODE CRIM. PRO. ANN. art. 895.1 (West Supp. 1980); N.C. GEN. STAT. § 15A-1343(e) (Supp. 1979); OR. REV. STAT. § 161.665 (1979); TEX. CRIM. PRO. CODE ANN. art. 42.12, § 6(k) (Vernon Supp. 1980); VA. CODE § 19.2-305 (Supp. 1980); WASH. REV. CODE § 9.95.210 (Supp. 1980).

133. FLA. STAT. ANN. § 27.56(1)(c) (West Supp. 1980); MD. ANN. CODE art. 27A, § 7(g) (Supp. 1980); MINN. STAT. § 611.35(1) (Supp. 1980); NEV. REV. STAT. § 176.091 (1979); N.H. REV. STAT. ANN. § 604-A:9 (1974); S.D. CODIFIED LAWS ANN. § 23A-40-10 (Supp. 1980); UTAH CODE ANN. § 77-66-6 (Supp. 1979).

134. OR. REV. STAT. § 161.665 (1979).

135. MD. ANN. CODE art. 27A, § 7(g) (Supp. 1980); MINN. STAT. § 611.35(1) (Supp. 1980); NEV. REV. STAT. § 176.091(2) (1979); N.C. GEN. STAT. § 15A-1343(e) (Supp. 1979) (costs imposed unless "the court finds there are extenuating circumstances . . ."); S.D. CODIFIED LAWS ANN. § 23A-40-10 (Supp. 1980); UTAH CODE ANN. § 77-66-3 (Supp. 1979).

136. 17 ARIZ. REV. STAT. ANN. § 6.7 (1973); N.J. REV. STAT. § 2A:158A-16 (1979); N.C. GEN. STAT. § 7A-455 (1969); OR. REV. STAT. § 135.055(6) (1979); TENN. CODE ANN. § 40-2017 (Supp. 1980); W. VA. CODE § 51-11-7 (Supp. 1980).

137. 18 U.S.C. § 3006A(f) (1976); D.C. CODE ANN. § 11-2606(2) (1978).

nonindigents.¹³⁸

A final form that recoupment assumes is what can best be termed a general recoupment statute. While it may include provisions permitting recoupment as a condition of probation or recovery from those who were partial indigents or nonindigents at the time they received their court-appointed defense, its ambit is a good deal broader. Such a statute considers future ability to pay, thus imposing liability despite the fact that the defendant might actually have been indigent while being defended. This feature seems to transcend the narrow confines of the Oregon scheme endorsed in *Fuller* which, because it was a probation condition imposed at the time of sentencing, reflected the defendant's ability to pay at a time when he was still being represented by his court-appointed attorney. The *Fuller* Court, though approving the Oregon scheme, did not go so far as to hold that *only* a repayment obligation based on the defendant's ability to pay at the time services were received was permissible. In addition, there was no mention of this issue in *James*, where the Kansas statute under review imposed continuing liability for two years. A general recoupment statute, moreover, can encompass both acquitted and convicted indigents. In fact, only three¹³⁹ of the twenty-one¹⁴⁰ general recoupment statutes limit their application to convicted defendants. The great variety and complexity of these statutes require a detailed examination of the many provisions found in these laws.

The first few features to be considered are those endorsed by the Supreme Court in *James* and *Fuller* and are thus essential requirements for continued Court approval. A provision of constitutional significance, one making repayment contingent upon a determination of the defendant's ability to pay, surprisingly is provided for expressly in

138. CONN. GEN. STAT. § 51-297 (1977); GA. CODE ANN. §§ 27-3209(c), -3211(a) (1978); IDAHO CODE §§ 19-854(c), -858(a) (1979); MO. ANN. STAT. § 600.100 (Vernon 1979); NEB. REV. STAT. § 29-1804.10 (1979) (applies to felony defendants only); N.M. STAT. ANN. §§ 31-16-5(C), -7(A) (1978); VT. STAT. ANN. tit. 13, §§ 5236(c), 5255(a) (1974); WYO. STAT. §§ 7-1-112(c), -114(a) (1977).

139. N.H. REV. STAT. ANN. § 604-A:9 (1974); N.C. GEN. STAT. § 7A-455 (1969); UTAH CODE ANN. §§ 77-66-1 to 14 (Supp. 1979).

140. The remaining 18 general recoupment statutes are: ARK. STAT. ANN. §§ 43-2403, -2408.1, -2408.3 (Supp. 1979); CAL. PENAL CODE § 987.8 (West Supp. 1979-1980); CONN. GEN. STAT. § 51-298 (1977); FLA. STAT. ANN. § 27.56 (West Supp. 1980); GA. CODE ANN. § 27-3211 (1978); IDAHO CODE § 19-858 (1979); MD. ANN. CODE art. 27A, § 7 (Supp. 1980); MINN. STAT. § 611.35 (Supp. 1980); MO. ANN. STAT. §§ 600.100, .105 (Vernon 1979); NEV. REV. STAT. § 178.398 (1979); N.J. REV. STAT. §§ 2A:158A-17 to 19 (1979); N.M. STAT. ANN. § 31-16-7 (1978); N.D. CENT. CODE § 29-07-01.1 (1974); PA. STAT. ANN. tit. 19, § 793 (Purdon Supp. 1980-1981); S.C. CODE § 17-3-40 (Supp. 1979); S.D. CODIFIED LAWS ANN. §§ 23A-40-10 to 16 (Supp. 1980); VT. STAT. ANN. tit. 13, § 5255 (1974); WIS. STAT. ANN. § 256.66 (West 1971).

only seventeen of the twenty-one statutes.¹⁴¹ Two of these, moreover, make ability to pay applicable only to recoupment when it is a probation condition, not to the remainder of the statute which applies uniformly to both acquitted and convicted defendants.¹⁴² The advantages of a provision specifying the ability to pay condition is obvious insofar as a constitutional test of a recoupment law is concerned. The vagaries of individual court misapplication would not then jeopardize the entire statute with the possibility of judicial invalidation. A related provision, not necessarily of constitutional dimension, is one which permits the defendant, after imposition of the repayment obligation, to petition the court for remission of the amount owed and which empowers the court to remit part or all of the amount if it determines that continued imposition would pose a hardship for the defendant or his family. Only four statutes include such a provision.¹⁴³

The next feature approved in *Fuller* is one which specifies that failure to make payment cannot result in imprisonment for contempt of court unless there is a showing that such nonpayment was the result of a deliberate refusal to obey the repayment order or a failure to make a good faith effort to pay. The Pennsylvania¹⁴⁴ and Utah¹⁴⁵ statutes are the only ones incorporating such provisions. The Arizona¹⁴⁶ and California¹⁴⁷ schemes obviate this problem by specifying that nonpayment cannot be regarded as contempt at all, but only as a violation of a civil judgment. Presumably, in all the other jurisdictions enforcement of this requirement is left to the individual courts.

The provision which the Supreme Court found fatal to the Kansas scheme in *James* was one which failed to afford the defendant-debtor all the protective exemptions given other judgment debtors. Only two statutes, however, expressly provide such exemptions.¹⁴⁸ Ten other

141. Those four statutes *not* providing for such determination at some point, and thus in danger of being facially invalid, are: ARK. STAT. ANN. §§ 43-2403, -2408.1, -2408.3 (Supp. 1979); N.H. REV. STAT. ANN. § 604-A:9 (1974); S.C. CODE § 17-3-40 (Supp. 1979); S.D. CODIFIED LAWS ANN. §§ 23A-40-10 to 16 (Supp. 1980).

142. The dictates of *Fuller* in these statutes seem to be taken almost too literally. MD. ANN. CODE art. 27A, § 7 (Supp. 1980); NEV. REV. STAT. §§ 176.091, 178.398 (1979).

143. CAL. PENAL CODE § 987.8(d) (West Supp. 1979-1980); FLA. STAT. ANN. § 27.56(4) (West Supp. 1980); NEV. REV. STAT. § 176.091(3) (1979) (provision applies only to convicted defendants); UTAH CODE ANN. § 77-66-4 (Supp. 1979) (entire statute applies only to convicted defendants).

144. PA. STAT. ANN. tit. 19, § 793 (Purdon Supp. 1980-1981).

145. UTAH CODE ANN. § 77-66-8 (Supp. 1979).

146. 17 ARIZ. REV. STAT. ANN. § 6.7 (1973).

147. CAL. PENAL CODE § 987.8(a) (West Supp. 1979-1980).

148. FLA. STAT. ANN. § 27.56(6) (West Supp. 1980); S.D. CODIFIED LAWS ANN. § 23A-40-15 (Supp. 1980).

statutes, while not specifically enumerating available exemptions, provide that recoupment is to be treated as a judgment in a civil action¹⁴⁹ or as a judgment at law.¹⁵⁰ Seven statutes merely state that suit may be brought for recovery of defense fees.¹⁵¹ Presumably, this entails a civil action with all its accompanying safeguards. Thus, of the twenty-one statutes, nineteen provide, in one manner or another, for equivalence in the exemptions accorded defendant-debtors and other judgment debtors.¹⁵² It must be remembered, however, that *James* merely required that defendant-debtors be given the *same* exemptions as other debtors; it did not require states to give *any* exemptions to debtors generally.

Other provisions, while deemed essential by some state courts, were not contemplated in decisions of the United States Supreme Court. One such provision requires that notice be given the defendant at the time of the appointment of counsel that recoupment might take place.¹⁵³ Only two states, California¹⁵⁴ and Missouri,¹⁵⁵ include such prior notice as part of their recoupment statutes. While other states have notice provisions, such notice is merely notice of a lien or judgment given some time after the appointment of counsel and usually after criminal proceedings are terminated.¹⁵⁶ Another provision is one allowing the defendant a hearing on the amount of the accrued defense debt.¹⁵⁷ Connecticut,¹⁵⁸ Florida,¹⁵⁹ Maryland¹⁶⁰ and Minnesota¹⁶¹ ap-

149. CAL. PENAL CODE § 987.8(a) (West Supp. 1979-1980); CONN. GEN. STAT. § 51-298(b) (1977); MO. ANN. STAT. § 600.105 (Vernon 1979); NEV. REV. STAT. § 176.275 (1979); UTAH CODE ANN. § 77-66-13 (Supp. 1979).

150. MD. ANN. CODE art. 27A, § 7 (Supp. 1980); N.J. REV. STAT. § 2A:158A-17 (1979); N.C. GEN. STAT. § 7A-455(b) (1969); PA. STAT. ANN. tit. 19, § 793 (Purdon Supp. 1980-1981); S.C. CODE § 17-3-40 (Supp. 1979).

151. ARK. STAT. ANN. § 43-2403 (1977) (suit to enforce lien for costs, which can include appointed defense fees); GA. CODE ANN. § 27-3211 (1978); IDAHO CODE § 19-858 (1979); MINN. STAT. § 611.35(2) (Supp. 1980); N.M. STAT. ANN. § 31-16-7 (1978); VT. STAT. ANN. tit. 13, § 5255 (1974); WIS. STAT. ANN. § 256.66 (West 1971).

152. The two statutes which do not appear to provide such equivalence are: N.H. REV. STAT. ANN. § 604-A:9 (1974); N.D. CENT. CODE § 29-07-01.1 (1974).

153. See *Stacey v. State*, 30 Or. App. 1075, 569 P.2d 640 (1977); *Commonwealth v. Opara*, 240 Pa. Super. 511, 362 A.2d 305 (1976). See also *White Eagle v. State*, 280 N.W.2d 659, 661-62 (N.D. Sup. Ct. 1979) (notice not constitutionally required but should be given anyway); *Kamisar & Choper, supra* note 119, at 26-27.

154. CAL. PENAL CODE § 987.8(b) (West Supp. 1979-1980).

155. MO. ANN. STAT. § 600.105 (Vernon 1979).

156. See, e.g., MD. ANN. CODE art. 27A, § 7 (Supp. 1980) (notice of hearing for perfection of lien); N.J. REV. STAT. § 2A:158A-17 (1979) (notice of filing of lien).

157. See *Commonwealth v. Opara*, 240 Pa. Super. 511, 521, 362 A.2d 305, 310-11 (1976) (defendant is due some sort of accounting of costs); *State ex rel. Brundage v. Eide*, 83 Wash. 2d 676, 681, 521 P.2d 706, 709 (1974) (unfairness in requiring payment from defendant when he is not party to fee arrangement).

158. CONN. GEN. STAT. § 51-298 (1977) (defendant may contest the value of services rendered).

159. FLA. STAT. ANN. § 27.56(7) (West Supp. 1980) (full adversary hearing allowed).

pear to allow the defendant such a hearing.

Some provisions have not been found essential by any courts but seem to have been included for administrative convenience. Five schemes permit settlement or compromise of a debt other than by the imposing court.¹⁶² The creation of a lien upon the defendant's property is specified in eight statutes.¹⁶³ Finally, twelve statutes provide a statute of limitations on the recovery of defense costs;¹⁶⁴ the remainder presumably either impose open-ended liability or are subject to a general statute of limitations for debts.

While most of the general recoupment statutes contain the two essential components held by the Supreme Court to be necessary for validation, *i.e.*, a determination of the defendant's ability to pay and the equivalence of defendant-debtors and other judgment debtors, the paucity of other safeguards would appear to leave many of these same statutes open to constitutional attack on other grounds. Moreover, several statutes, virtually without safeguards of *any* kind, are especially vulnerable to constitutional challenge. New Hampshire's terse statute, for example, while applying only to convicted defendants, contains no provisions for determining ability to pay, equivalence of debtors or any other safeguard.¹⁶⁵ The Arkansas¹⁶⁶ and South Carolina¹⁶⁷ schemes also do not provide for a determination of the defendant's ability to pay, although they do provide debtor equivalence.

160. MD. ANN. CODE art. 27A, § 7 (Supp. 1980) (defendant may contest filing of lien; amount of compensation set by court).

161. MINN. STAT. § 611.35(1) (Supp. 1980) (court to determine amount of fee in hearing).

162. CONN. GEN. STAT. § 51-298(c) (1977) (attorney general may compromise, settle or forego any claims when "the best interest of the state will be served by such action"); FLA. STAT. ANN. § 27.56(4) (West Supp. 1980) (board of county commissioners authorized to "satisfy, compromise, settle, subordinate, release, or otherwise dispose of any debt . . ."); MINN. STAT. § 611.35(2) (Supp. 1980) ("[t]he county attorney may compromise and settle any claim . . . with the approval of the court . . ."); N.J. REV. STAT. § 2A:158A-20 (1979) (public defender authorized to compromise and settle); S.D. CODIFIED LAWS ANN. § 23A-40-14 (Supp. 1980) (county board of commissioners "may enforce, foreclose, satisfy, compromise, settle, subordinate, release, or otherwise dispose . . .").

163. ARK. STAT. ANN. § 43-2403 (1977); FLA. STAT. ANN. § 27.56(2) (West Supp. 1980); MD. ANN. CODE art. 27A, § 7 (Supp. 1980); NEV. REV. STAT. § 176.275 (1979); N.J. REV. STAT. § 2A:158A-17 (1979); N.C. GEN. STAT. § 7A-455 (1969); S.C. CODE § 17-3-40 (Supp. 1980); S.D. CODIFIED LAWS ANN. § 23A-40-11 (Supp. 1980).

164. ARK. STAT. ANN. § 43-2403 (1977) (2 yrs.); CAL. PENAL CODE § 987.8 (West Supp. 1979-1980) (6 mos.); CONN. GEN. STAT. § 51-298(b) (1977) (10 yrs.); GA. CODE ANN. § 27-3211 (1978) (4 yrs.); IDAHO CODE § 19-858 (1979) (3 yrs.); MINN. STAT. § 611.35 (Supp. 1980) (2 yrs.); NEV. REV. STAT. § 178.398 (1979) (6 yrs.); N.J. REV. STAT. § 2A:158A-17 (1979) (10 yrs.); N.M. STAT. ANN. § 31-16-7 (1978) (3 yrs.); N.D. CENT. CODE § 29-07-01.1 (1974) (6 yrs.); VT. STAT. ANN. tit. 13, § 5255 (1974) (3 yrs.); WIS. STAT. ANN. § 256.66 (West 1971) (10 yrs.).

165. N.H. REV. STAT. ANN. § 604-A:9 (1974).

166. ARK. STAT. ANN. § 43-2403 (1977).

167. S.C. CODE § 17-3-40 (Supp. 1980).

Some laws, on the other hand, merit special attention because of their inclusion of a number of detailed safeguards. The California statute¹⁶⁸ is noteworthy for its careful consideration of the defendant's ability to pay, to be determined at a full adversary hearing;¹⁶⁹ its provision of prior notice; its provision of a right to the defendant to petition for remission of his debt; its exemption of a nonpaying defendant from a contempt action; and its provision that the debt shall have the same effect as a civil judgment. The statute does not provide that recoupment can be made a condition of probation, although one court tried to use it for that purpose without success.¹⁷⁰

The Florida law¹⁷¹ has separate subsections for recovery from convicted and acquitted defendants, for recoupment from parents of minors represented by the public defender, for executing liens, for petitioning for remission or modification of the debt, for settlement and compromise by the county board, for all exemptions accorded other judgment debtors and for an adversary hearing to determine the amount of the debt. The statute also contains a unique provision which permits the county board to contract with a collection agency in order to dispose of the debt. Curiously, the statute does not provide for a hearing on the defendant's ability to pay *before* imposition of the obligation. Such a hearing, however, is afforded either after the defendant petitions the court for remission of his debt or after he defaults on his payments;¹⁷² in either situation the court is empowered to give the defendant additional time or reduce or revoke the unpaid debt.

The Tennessee recoupment statute¹⁷³ ostensibly imposes liability based only on the defendant's ability to pay during the actual receipt of his defense services. Unique for its detailed procedures for determining indigency, it empowers the court to order the social service agency serving the judicial circuit to conduct an investigation into the finances of the defendant and to use the report of this investigation in determining the level of repayment due from the defendant. Finally, upon a

168. CAL. PENAL CODE § 987.8 (West Supp. 1979-1980).

169. This explicit formulation was added to the statute after an appellate court held that, where a defendant had been ordered to make reimbursement after a "hearing" in which the prosecutor, not under oath, had made statements which were not subject to cross-examination, did not constitute a "hearing" as contemplated by the statute. The court also said that the defendant must be afforded the opportunity to testify himself and to present evidence. *People v. McDowell*, 74 Cal. App. 3d 1, 141 Cal. Rptr. 124 (1977).

170. *People v. Johnson*, 27 Cal. App. 3d 781, 104 Cal. Rptr. 75 (1972).

171. FLA. STAT. ANN. § 27.56 (West Supp. 1980).

172. Should the defendant default, he can be held in contempt unless he proves at the subsequent hearing that his default was neither intentional nor in bad faith. *Id.* § 27.561.

173. TENN. CODE ANN. § 40-2017 (Supp. 1980).

determination of partial indigency, the court can establish an amount and a payment schedule compatible with the defendant's financial circumstances. The payments only continue until the conclusion of proceedings in the trial court, at which time the defense attorney is paid the funds collected less a five percent court clerk's commission. The statute thus is unusual because recoupment is effected to compensate the defendant's attorney directly, rather than providing for an indirect reimbursement to the state which is itself responsible for compensating the attorney.¹⁷⁴

In summary, there is a remarkable variety to the approaches used by various jurisdictions in their attempts at recovering court-appointed defense costs. Some states impose liability only on convicted defendants and can condition probation on a repayment of such costs. Others only impose liability based on ability to pay at the time the defense was being conducted. Still others, the most numerous and diverse group, try to recoup uniformly from all for whom counsel was appointed, regardless of the outcome at trial, and impose liability beyond the time that the services were actually received. Although the majority of these schemes contain the two essential requirements for constitutional validity as established by the Supreme Court, others remain open to constitutional challenge because of their failure to provide for these requirements, and an even greater number are lacking features endorsed by other reviewing courts and commentators.

ELEMENTS OF A MODEL STATUTE

In drafting a model recoupment statute, primary consideration must of course be given to including those elements deemed essential by the United States Supreme Court. Secondly, those features not necessarily essential but mentioned approvingly by the Court must be considered. Next, provisions considered important or essential by state reviewing courts must be contemplated. Finally, consideration for inclusion must be given to provisions suggested by critics of recoupment laws as corrective of certain deficiencies, as well as provisions which appear necessary for the effective administration of such laws. The focus throughout should be on assuring indigents that counsel will always be provided on request and that recoupment, if imposed, will be fairly and evenhandedly administered.

174. Other sections of the Tennessee Code provide for compensation of appointed counsel by the state, with account taken of any payments made to the attorney by the defendant. TENN. CODE ANN. §§ 40-2022 to 2026 (1975).

Before embarking on such a discussion, it is necessary to consider the question of how detailed such a statute needs to be. If a statute is not specific enough, leaving too much to the discretion of the lower courts, there always is danger that a particular court might misapply the law and thus invite appellate reversal.¹⁷⁵ Alternatively, if a statute is too specific with regard to a questionable provision, it can be rendered incapable of a "reasonable" construction and ultimately held invalid.¹⁷⁶ Thus, although the direction to be taken should clearly be one toward specificity and detail, thereby giving clear guidance to the courts, care must be taken to ensure that such detail does not back the statute into a corner of "unreasonableness." Always, some leeway should be afforded the sound discretion of the court. For example, the court might totally refuse to enforce repayment under certain conditions, as when it determines that the defense was necessitated by a frivolous or malicious prosecution.¹⁷⁷

To begin with, the model statute, in order to maximize its revenue-generating potential, should permit recoupment from both acquitted and convicted defendants. Because the Oregon statute under review only applied to convicted defendants, *Fuller* entertained an equal protection argument which maintained that the constitutional guarantee was violated by the statute's unequal treatment of those convicted and those acquitted or whose convictions were reversed. This argument was dismissed by the Court's determination that a "rational relationship" existed between the classification and the state's objective of keeping those not convicted from further imposition by the state.¹⁷⁸ Although the Court approved the imposition of reimbursement only on convicted defendants, such approval certainly does not seem to preclude the imposition of repayment on acquitted defendants in other statutory contexts. Thus, while the classification created by the Oregon statute was sustained, the Court never addressed the issue of whether or not such a classification was mandatory. Although some subsequent decisions appear to have interpreted the conviction requirement as part

175. Compare the considerable difference in application and resulting judicial treatment of a probation statute's "omnibus" clause, which offers the widest possible discretion to the imposing court, in *State v. Hess*, 86 Wash. 2d 51, 541 P.2d 1222 (1975), where the lower court's order was overturned, with *State v. Barklind*, 87 Wash. 2d 814, 557 P.2d 314 (1977), where it was upheld. See text accompanying notes 85-87 *supra*.

176. See *Simmons v. James*, 467 F. Supp. 1068, 1079-80 (D. Kan. 1979). See also text accompanying notes 112-14 *supra*.

177. Although repealed, the Alabama costs legislation provided that the court could hold the prosecutor liable for costs if it deemed a misdemeanor prosecution frivolous or malicious. ALA. CODE § 15-18-60 (1975) (repealed 1980).

178. 417 U.S. at 48-50.

of the holding in *Fuller*,¹⁷⁹ this seems to be a misreading of that decision. Other lower court decisions relying on *Fuller* fail even to mention the convicted-acquitted distinction.¹⁸⁰ Actually, recouping uniformly from both classes of defendants would comport with general concepts of fairness and would tend to place the indigent defendant on similar footing with his nonindigent counterpart. After all, nonindigent defendants are required to pay their attorneys regardless of the outcome at trial. When acquitted defendants with appointed counsel are exempted from any repayment obligation, they are effectively placed in a financial position superior to all other defendants—convicted defendants with appointed counsel as well as acquitted and convicted defendants with retained counsel.

Next, the model statute should provide that at a defendant's arraignment or preliminary hearing, he should receive notice of his right to appointed counsel in the event that he cannot afford to retain a private attorney. Such notice should also include notice of recoupment in the event that the court subsequently determines the defendant capable of repayment. Assurance should be given to the defendant that *only* if he is found able to pay will he ever be required to do so, and, that even then the amount due and the manner of payment will be such as to ensure that no hardship results from the obligation. The essential paradox of prior notice of recoupment was one factor that led the California court in *In re Allen* to condemn recoupment as a "chill" on the defendant's right to counsel.¹⁸¹ On the one hand, due process seems to demand that one be informed that by accepting appointed counsel he may be incurring a financial obligation; on the other hand, such notice arguably "chills" the right to counsel by possibly inducing a waiver of

179. See *Olson v. James*, 603 F.2d 150 (10th Cir. 1979); *State v. Barklind*, 87 Wash. 2d 814, 557 P.2d 314 (1977).

180. See *United States v. Santarpio*, 560 F.2d 448 (1st Cir. 1977); *People v. Cook*, 81 Ill. 2d 176, 407 N.E.2d 56 (1980); *Commonwealth v. Opara*, 240 Pa. Super. 511, 362 A.2d 305 (1976). Indeed, the Kansas scheme invalidated in *James* applied to both convicted and acquitted defendants and the court made no adverse mention of this fact in its decision. See text accompanying notes 45-55 *supra*.

181. 71 Cal. 2d 388, 391-92, 455 P.2d 143, 144-45, 78 Cal. Rptr. 207, 208-09 (1969). One writer critical of what he perceived to be an apparent expansion of the right to counsel in *Allen* acknowledged that some defendants might refuse appointed counsel if they knew that they would later have to pay for it:

This is equally true, however, of non-indigent criminal defendants—particularly those with moderate financial resources—who are faced with the high cost of legal representation if they choose to retain counsel. Therefore, since the court's chilling argument is applicable to both classes of defendants, it would appear that *Allen* could be read to stand for the proposition that in California *all* criminal defendants are entitled to free, or at least partially subsidized, court-appointed counsel.

The Supreme Court of California 1968-1969, 58 CAL. L. REV. 255, 259 (1970) (emphasis in original) (footnote omitted).

this appointed counsel.¹⁸² *Fuller* seemed to lay this issue to rest by insisting that the defendant's eligibility for appointed counsel is not affected by the possibility of recoupment.¹⁸³ Moreover, some state courts and other commentators have said that prior notice of recoupment is a requirement of constitutional dimension.¹⁸⁴ Such notice might also have the incidental effect of deterring false claims of indigency. Knowing that they might have to pay for their defense anyway, many financially able defendants might choose to retain counsel of their own.¹⁸⁵

A provision that also should be included, one not part of any present recoupment statute, is one which would permit the defendant to select as well as discharge counsel of his own choice in lieu of appointed counsel or the public defender.¹⁸⁶ Such a provision would deflect a suggested equal protection argument: if the defendant may ultimately pay for his defense services, he should have the same measure of control over his counsel that other paying defendants have.¹⁸⁷ This freedom of choice and control would help remedy the inferior position of the needy defendant with respect to that of the defendant with

182. See 1 L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* 113 (1965).

183. 417 U.S. at 51-53.

184. See note 151 *supra*. See also *Burdening the Indigent*, *supra* note 22, at 318-19; KANSAS, *supra* note 113, at 350.

185. See Kamisar & Choper, *supra* note 119, at 26-27. See also Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 585 (1963), where its authors state that "[t]he most widely felt abuse of the assignment system is the false claim of indigency to obtain free counsel."

186. The ramifications and benefits of this "freedom of choice" concept of public defense delivery is given thorough treatment in KRANTZ & SMITH, *supra* note 119, at 259-62. The "judicare" system of public defense delivery, which incorporates "freedom of choice," is evaluated in S. BRAKEL, *JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS, AND POOR PEOPLE* (1974). Under judicare, which is funded by the Office of Economic Opportunity, an indigent in need of counsel applies at a local Community Action Program office or at the county welfare agency where his eligibility is determined and a card is issued if he is found eligible. The cardholder then selects a participating local attorney, who is free to refuse a specific cardholder or not to participate at all. However, in the areas under study (Wisconsin, Michigan and Montana), most attorneys do participate, although the "extent of involvement is very uneven." *Id.* at 14. It is significant to note that, while the lawyers surveyed felt that freedom of choice was the best aspect of the program, the defendants themselves said that the fact that the legal services were free and available when needed was most important to them. *Id.* at 49. See also Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).

187. See *Recoupment Statutes*, *supra* note 21, at 112; 56 MARQ. L. REV. 551, 554-55 (1973). Realistically, this argument is based more on concepts of fairness than on traditional equal protection analysis. The Supreme Court has held that wealth is not a suspect classification and, therefore, does not trigger strict scrutiny. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973). Hence, any classification based on wealth (as this one certainly is) would merely have to survive the "rational relationship" test. Since administrative convenience is a sufficiently legitimate state objective under this test, the classification would probably be upheld. See note 29 *supra*.

retained counsel and would do much to dispel some of the ethical objections to recoupment.¹⁸⁸ One who retains an attorney, after all, is not only paying for the attorney's services but also for the right to choose. This right of choice is especially significant when consideration is given to the low esteem in which the public defender is often held.¹⁸⁹ While administration of such a "freedom of choice" provision might pose some problems, at least initially, these would by no means be insoluble. Such "retained" counsel could be paid by the court in much the same way and using the same standards as other appointed counsel. While some attorneys might be reluctant to defend indigents on this basis, others probably would be willing. Moreover, the number of indigents choosing the "retained" option would probably not be overwhelming; many, faced with the immediate need for counsel, would choose appointed counsel or the public defender rather than shop around for a willing attorney.

After receiving notice of the right to appointed counsel and of the possibility of recoupment, the defendant requesting appointed counsel should be presumed, for the purposes of the proceeding, to be indigent and thereby eligible for such counsel.¹⁹⁰ In the absence of such a presumption, individual courts by briefly examining the defendant as to his financial circumstances might apply uneven standards of eligibility, especially in marginal situations. By putting in abeyance a thorough evaluation of the defendant's ability to pay, all defendants are assured of counsel when they need it; if one is later found to have sufficient income or unusually large assets, he can be ordered to pay at that time.

At or shortly after his first hearing the defendant should complete and sign under penalty of perjury a financial statement particularizing his income, assets, liabilities, dependents and any other information

188. See, e.g., *In re Allen*, 71 Cal. 2d 388, 392, 455 P.2d 143, 145-46, 78 Cal. Rptr. 207, 209-10 (1969).

189. See, e.g., J. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 106-15 (1972), where the defendant's view of the embattled position of the public defender is poignantly examined. In a survey reported by the author, only 20.4% of the defendants represented by the public defender (as compared to 100% represented by private attorneys) felt that their lawyer was "on their side." *Id.* at 105. See also *Faretta v. California*, 422 U.S. 806 (1975), in which the defendant's right to *refuse* appointed counsel and proceed pro se was upheld. The defendant had declined the appointment of the public defender, contending that the defender was "very loaded down with . . . a heavy caseload." *Id.* at 807. One observer has also suggested that *Faretta* eliminated an argument against recoupment: if the defendant were prohibited from waiving appointed counsel and subsequently had to pay for his representation, he arguably was being deprived of property without due process. See *Recoupment Statutes*, *supra* note 21, at 111.

190. The "presumption" strategy of determining eligibility for appointed counsel is as good a method as any, and is probably better than most. The defendant himself is more acutely aware than anyone of the nuances of his financial circumstances and the impact that retained counsel would have on him and his family. See KRANTZ & SMITH, *supra* note 119, at 318-19.

relevant to his financial situation. The court may then refer selected individual financial statements for further verification and investigation by either the court's social service department or other designated agency serving the court.¹⁹¹ Because investigation of all such statements would entail considerable expense, selective investigation combined with adequate publicity would ultimately serve the same deterrent purpose; as word of possible investigation spread, defendants would be less likely to falsify information.¹⁹² This statement and possible investigative report would later become the bases for imposing liability.

Next, the model statute should provide that the appointed counsel is to furnish the court and the defendant an itemized accounting of costs at the conclusion of the proceedings. The defendant should have the opportunity to contest this amount in a full adversary hearing if he thinks the accounting is incorrect or improper. The court would then award the appointed counsel a reasonable fee, setting forth the basis for its decision in a written statement to be provided to the defendant.¹⁹³ Such a procedure would do much to blunt the "chill" argument that, because he is not involved in any fee negotiations and thus is uncertain of the extent of his potential liability, the indigent defendant may choose to waive his right to appointed counsel.¹⁹⁴

Next, but most important, the *Fuller* requirement of a determination of the defendant's ability to pay must be included as the *sine qua non* of any recoupment plan. This should be done, as in the statute approved in *Fuller*, in a hearing held after the conclusion of proceedings and after the reasonable defense costs are established. The hearing itself should incorporate all possible procedural safeguards to guarantee that the issue of the defendant's ability to pay is fairly decided. As in the California statute,¹⁹⁵ the defendant should be allowed to be heard himself, to present witnesses and other evidence, to con-

191. Such agency, whether already established or especially created for the purpose, could be further empowered to administer other aspects of the recoupment program, such as receipt and accounting of payments, disposition of petitions for remission, etc. *Cf.* TENN. CODE ANN. § 40-2017(b) (Supp. 1980).

192. *See* Kamisar & Choper, *supra* note 119, at 22.

193. The California statute specifies that whenever the court appoints an attorney for an indigent, the court shall weigh a number of factors in setting the amount of compensation. These include: customary fees in the community for privately retained counsel, time and labor required, the difficulty of the defense, the novelty or uncertainty of the law and the professional character, qualifications and standing of the attorney. CAL. PENAL CODE § 987.3 (West Supp. 1979-1980).

194. *See In re Allen*, 71 Cal. 2d 388, 393, 455 P.2d 143, 146, 78 Cal. Rptr. 207, 210 (1969); *State ex rel. Brundage v. Eide*, 83 Wash. 2d 676, 681, 521 P.2d 506, 509 (1974).

195. CAL. PENAL CODE § 987.8(a) (West Supp. 1979-1980).

front and cross-examine adverse witnesses and to receive a written statement of the court's decision.

The ability to pay should then be weighed against an objective standard of indigency, with a baseline standard of income set with reference to the current poverty level guidelines published by the United States Department of Labor.¹⁹⁶ Besides income, account should be taken of the number and ages of the defendant's dependents and available assets, and even then, the court should have the discretion to make allowances for special individual circumstances before imposing any repayment obligation. Such a "sliding scale" formula would exempt those below the baseline from any repayment obligation yet would require repayment of increasingly greater percentages of the total indebtedness by those determined to have greater income. Such a provision would span the full scale of recoupment possibilities: from no recoupment from true indigents, through partial recoupment from partial indigents, to full recoupment from nonindigents.

A decision must be made whether the model statute should extend liability for a defendant's ability to pay beyond the time that he actually was being defended. Because the *Fuller* Court addressed an Oregon scheme which appeared to consider the defendant's ability to pay only at the time of the defense itself, it would seem that a statute strictly within the *Fuller* model would not protract such liability. *Fuller*, however, though endorsing the Oregon scheme, did not expressly prohibit such an extension of liability. Additionally, a statute not extending liability would exempt many otherwise financially able defendants who were only temporarily "indigent" for a variety of reasons, including the possibility that they may have been in custody during trial and were thus rendered incapable of earning an income. Hence, a reasonable statutory period within which a defendant is liable *after* he receives his court-appointed defense would permit a reevaluation of these temporary "indigents," but would continue to exempt true indigents from any repayment obligation. Long periods of liability, especially with respect to acquitted defendants, seem intrinsically unfair—the thought that an acquitted defendant can be haled into court some five or ten years after his trial and ordered to pay his attorney's fees certainly makes the whole concept of recoupment somewhat repugnant. Lengthy statutes of limitations, moreover, generate many administrative problems, in-

196. The rationale and application of the United States Department of Labor's Bureau of Labor Statistics budget formulations with respect to determining eligibility for public defender services are considered in KRANTZ & SMITH, *supra* note 119, at 329-33.

cluding the accumulation of vast amounts of paperwork and the backing up of cases in already overburdened courts.¹⁹⁷ Therefore, a one-year limit measured from the date of the conclusion of formal proceedings against the defendant would be short enough to be administered easily and avoid being overly oppressive, yet long enough to permit a more in-depth evaluation of a defendant's earning capacity. A further limitation, for administrative convenience as well as fairness to the defendant, should be placed on the length of time installment payments could continue. Two years would permit monthly payments to be set in manageable amounts so as not to impose an unreasonable burden on the defendant.

If the defendant is originally deemed unable to pay, the statute should provide for a single rehearing, with all procedural safeguards, to be held within one year of the date of the original ability to pay hearing. At both hearings, the *present*, not future, financial ability of the defendant would be evaluated. If the defendant is found capable of payment at either hearing, his total obligation with respect to the length of time his installment payments can continue is two years. Thus, for example, if found capable of payment at the original hearing, the defendant's obligation cannot exceed two years and a second hearing would never be held. If found capable at the rehearing, his obligation can extend two years from that date. The rehearing, furthermore, is discretionary, and the court, if it decides that the defendant is a hard-core indigent with little chance of becoming capable of reimbursement, may forego a subsequent hearing and thus relieve itself of a meaningless formality.

Once under the obligation to pay, the defendant should have recourse to petition the court or the designated agency administering the recoupment program for remission of all or part of the amount owed. Because fairness to the defendant dictates that there should be no limitation on the number of such petitions, allowing the designated agency to rule on such petitions would relieve the court of what might possibly prove to be a considerable burden. The defendant should still be permitted to appeal from the agency's decision to the court itself. However, in order to deter the recurrence of frivolous appeals, only two such appeals should be granted during the term of the repayment. Finally, the agency (and in the case of appeals, the court) should be empowered to remit all or part of the debt if it should determine that the continued obligation presents a genuine hardship to the defendant or

197. *Id.* at 342.

his family. These provisions are adaptations of the ones approved in *Fuller* and, in essence, are extensions of the ability to pay doctrine enunciated in that decision.

To comply with the *Fuller* requirement that contempt cannot be imposed without a prior showing that failure to make payments was deliberate or in bad faith,¹⁹⁸ the statute should provide that the repayment order cannot be enforced by contempt of court proceedings. By so doing, and thus following the California¹⁹⁹ and Arizona²⁰⁰ approaches, the model statute would avoid the problem of later having to decide how and upon whom the burden rests to prove intentional failure to pay and what might constitute bad faith. Furthermore, an order to repay should be equivalent to a civil judgment and all exemptions available to other civil judgment debtors should attach. This provision would be included, of course, to satisfy the equal protection requirement announced in *James v. Strange*.²⁰¹

The statute should not create a lien on the defendant's property or assets. In view of the fact that an order to pay, when made after a full ability to pay hearing, has the effect of a civil judgment, the creation of a lien *before* such judgment becomes an unnecessary and burdensome intermediate step. For example, the New Jersey recoupment scheme creates "a lien on any and all property to which the defendant shall have or acquire an interest."²⁰² This lien permits the public defender to proceed to collect the amount due, using all remedies and "proceedings for the collection thereof which may be had or taken for or upon the recovery of a judgment in a civil action."²⁰³ Thus, the practical effect the lien has is to freeze the defendant's assets until such time as the debt is paid or otherwise discharged. This freezing of assets can result in a number of problems for the defendant, not the least of which would be difficulty in finding employment and establishing a credit rating, unfortunate effects which would be inconsistent with the purpose of a recoupment statute.²⁰⁴

Finally, the statute should not have a provision permitting the imposition of reimbursement as a condition of probation. Although the majority in *Fuller* approved of such a condition, Justice Marshall's equal protection objection remains compelling: while a defendant with

198. 417 U.S. at 46.

199. CAL. PENAL CODE § 987.8(a) (West Supp. 1979-1980).

200. 17 ARIZ. REV. STAT. ANN. § 6.7(d) (1973).

201. 407 U.S. 128 (1972). See text accompanying notes 45-55 *supra*.

202. N.J. REV. STAT. § 2A:158A-17 (1979).

203. *Id.* § 2A:158A-19.

204. See *Burdening the Indigent*, *supra* note 22, at 317.

appointed counsel can be imprisoned for not paying his defense fees, one with retained counsel cannot.²⁰⁵ The majority's response, that imprisonment is not imposed for nonpayment of a debt but for the willful disregard of a court order, is unconvincing. Indeed, the majority acknowledged that it actually did not have to address this argument because, in not being raised in either the petitioner's brief or in oral argument, it was not properly before the Court.²⁰⁶ Thus, the door was apparently left open for such a challenge in the future. Moreover, the wisdom of imposing such a condition has been seriously questioned.²⁰⁷ The oppressive nature of the obligation on one for whom imprisonment looms menacingly ahead and the resentment this engenders can negate what little rehabilitative effect such a condition may have.²⁰⁸ In any event, the recoupment statute, even without such a provision, would take effect on a financially eligible probationer and would furthermore afford him all protections available to the nonprobationer. The additional repayment incentive afforded by the fact that recoupment is made a condition of probation is ultimately not worth the unfairness and potential constitutional deficiency such a condition can create.

CONCLUSION

Recoupment of defense costs from defendants with assigned counsel is a most delicate undertaking, one requiring adherence to certain basic safeguards to ensure that the constitutional guarantees of right to counsel, due process and equal protection are not offended. Although the United States Supreme Court has offered some guidance as to the design of a permissible statute, it has implicitly and explicitly avoided confronting certain issues raised by recoupment. Consequently, considerable controversy has surrounded these "open" issues.

Certainly, a model recoupment statute taking Supreme Court and other guidelines into consideration can be drafted; and, unless there is a radical and unexpected shift in judicial perspective, such a statute would probably withstand constitutional challenge. This statute should primarily guarantee the right to the immediate appointment of counsel to any defendant who believes he is unable to afford to retain counsel, whether or not his inability can be objectively verified at the time of appointment. Moreover, the defendant with appointed counsel should

205. 417 U.S. at 60 (Marshall, J., dissenting).

206. *Id.* at 48 n.9.

207. See KRANTZ & SMITH, *supra* note 119, at 346; *Reimbursement*, *supra* note 130, at 1419-20.

208. See Kamisar & Choper, *supra* note 119, at 26.

be afforded the right of choice and control with respect to his counsel as nearly equivalent as possible to that enjoyed by the defendant with retained counsel. Repayment, if ordered at all, should be commensurate with the defendant's ability to pay and should never impose an open-ended obligation or be required if any hardship might result. The true indigent should be assured from the start that he will escape any further obligation as long as his financial status remains unchanged. Ultimately, such a statute would, far from inhibiting the exercise of the sixth amendment right to counsel, truly implement the broad vision of *Gideon v. Wainwright*²⁰⁹ by assuring *all* defendants the right to the counsel of their choice at the time that they need it the most.

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209. 372 U.S. 335 (1963).

APPENDIX

The following model represents a composite of the many safeguards and suggestions presented in the foregoing note. By no means does it purport to be a comprehensive enactment, since many provisions, *e.g.*, appropriation of funds, administration of payments, recoupment from parents of minors with appointed counsel, etc., have not been included. Rather, the principal purpose of this model is the presentation of a statute incorporating such basic safeguards and provisions as to equalize, as much as possible, the position of the defendant with appointed counsel with that of the defendant with retained counsel, while, at the same time, ensuring the constitutional validity of the state's recoupment procedure.

MODEL STATUTE: PROVISION OF DEFENSE SERVICES AND RECOVERY OF COSTS

Section 1. Presumption of Eligibility

Whenever the right to counsel for any person becomes mandated pursuant to any decision of the Supreme Court of the United States or of this State, or pursuant to the Constitution or Statutes of this State, and the person indicates that he is financially unable to retain counsel, he shall be presumed eligible for appointed counsel for the duration of the proceedings for which such counsel is mandated.

Section 2. Notice

Upon commencement of any proceeding relating to the matter for which a person indicates that he is unable to retain counsel, and such counsel is required pursuant to section 1 of this Act, the court shall give him notice:

(1) that, unless he waives his right to the assistance of counsel, counsel shall be appointed to represent him in the matter;

(2) that, if he so chooses, he may select counsel of his own to represent him and, if such counsel is willing to represent him, the court shall appoint such counsel to do so;

(3) that at the conclusion of the initial hearing or shortly thereafter he shall execute a Statement of Financial Eligibility under penalty of perjury and that such Statement is subject to investigation by the court;

(4) that at the conclusion of proceedings for which counsel was appointed, a hearing will be held wherein the value of the accrued fees

and other expenses of appointed counsel will be determined and wherein the defendant's present ability to pay such accrued costs will also be determined;

(5) that if he is determined to be able to pay all or a portion of such costs, he may be required to make repayment for all or such portion of his defense services as the court determines him capable of repaying;

(6) that if he is found to be unable to pay any of such costs, a subsequent hearing to determine his present ability to pay may be held within one year of the conclusion of proceedings and that a repayment obligation may be imposed at that time;

(7) that during any period when he is required to make repayments, he may petition the court to remit, reduce or otherwise modify the repayment obligation, and the court, upon presentation of satisfactory proof, is empowered to remit, reduce or otherwise modify the repayment obligation if it determines that the defendant is unable to pay or that the continuing obligation will pose an undue hardship on the defendant or his dependents.

Section 3. Waiver

No provision of this Act shall prevent a person otherwise eligible for appointment of counsel and duly notified of his right thereto from waiving his right to such appointment, provided that the waiver is executed in writing and the court has determined that such waiver was made knowingly and willingly and with full awareness of its consequences.

Section 4. Appointment of Counsel

After notice is given to a person pursuant to section 2 of this Act, and the right to counsel has not been waived, the court shall:

(1) appoint counsel selected by the person to represent him, provided such counsel is willing to do so pursuant to the provisions of this Act; or

(2) appoint other available counsel to defend him; or

(3) in counties with a public defender's office, appoint the public defender to represent him.

Section 5. Dismissal of Counsel

The person for whom counsel was appointed pursuant to section 4 of this Act may, with the permission of the court for cause shown, dis-

miss his court-appointed counsel and receive appointment of substitute counsel. Dismissed counsel shall prepare an itemized accounting of fees and expenses incurred on the person's behalf and such accounting shall be filed with the court clerk who shall hold it for use in the Cost Account Hearing.

Section 6. Statement of Financial Eligibility

At the conclusion of the initial hearing at which counsel is appointed, the defendant shall execute a Statement of Financial Eligibility under penalty of perjury wherein he shall specify his present income from any source, liquid and fixed assets, liabilities, dependents and any other information which might reflect on his ability to pay for counsel. The court may order the social service agency or any other designated agency or department serving the court, if such is available, to investigate the financial circumstances of any person executing such Statement and to report its findings to the court. The designated agency shall be empowered to obtain any financial information from any source, public or private, in order to conduct its investigation.

Section 7. Cost Account Hearing

At the conclusion of proceedings in the court on any matter for which counsel was appointed by the court, a hearing shall be held to determine the reasonable value of the fees and expenses incurred by the appointed counsel in the conduct of the defense. Appointed counsel shall present the defendant and the court with an itemized accounting of all such fees and expenses, and the defendant will be allowed to challenge such accounting. The defendant shall be permitted to be heard himself, to present witnesses and evidence and to confront and cross-examine adverse witnesses. The court shall then determine the amount of the compensation and shall present the defendant with a written copy of its decision, setting forth the basis for its determination. The court shall then authorize the payment to the appointed counsel of the entire amount of the compensation thus determined from funds set aside for this purpose.

Section 8. Ability to Pay Hearing

(1) Immediately following the Cost Account Hearing, a hearing shall be held to determine the defendant's present ability to pay for all or part of his court-appointed defense costs. At this hearing, the defendant shall be permitted to be heard himself, to present witnesses and

evidence and to confront and cross-examine adverse witnesses. In determining the defendant's ability to pay the court shall consider:

- (a) the defendant's income regardless of source;
- (b) the current poverty level income standard established with reference to figures published and regularly revised by the Bureau of Labor Statistics of the United States Department of Labor;
- (c) the defendant's net worth;
- (d) the defendant's obligations to his dependents; and
- (e) any other circumstances relevant to the issue of the defendant's ability to pay.

(2) If the court determines that the defendant has sufficient income and/or net worth to pay for all or part of his appointed defense costs, it may order the defendant to make payments according to a payment schedule requiring payment of a percentage of the total indebtedness commensurate with the determined available funds of the defendant. Although such a schedule shall be an objective standard using for its baseline the poverty level income as determined by the Bureau of Labor Statistics of the United States Department of Labor, the court may, at its discretion, modify the total amount due or the amount of any individual payment if particular circumstances dictate.

(3) If the court determines that the defendant has the present ability to pay for his appointed defense costs and orders him to repay in consecutive periodic installments, such payments cannot continue for more than two years.

(4) If the court determines that the defendant not only does not have the present ability to pay for his appointed defense costs but also determines that there is little or no likelihood that the defendant will have such ability within the following year, it may order that a rehearing pursuant to section 9 of this Act not be held.

(5) After making its determination, the court shall provide the defendant with a written statement of its findings, setting forth the basis for its decision and specifying the amount and manner of repayment, if such is imposed.

(6) If repayment is not imposed and the court determines that a subsequent hearing pursuant to section 9 of this Act should be held, it shall set the rehearing on the court's calendar for a date no fewer than eleven months and not exceeding twelve months from the date of the Ability to Pay Hearing. The court shall notify the defendant of the time and date of the rehearing and of his rights with respect thereto.

Section 9. Ability to Pay Rehearing

If the court determines that the defendant is financially incapable of repaying the costs of his court-appointed defense at the Ability to Pay Hearing, a rehearing may be held within one year of, but no sooner than eleven months after, the date of the Ability to Pay Hearing in order to determine again the defendant's present ability to pay. Such rehearing shall follow all procedures and guidelines set forth in section 8 of this Act.

Section 10. Petition for Remission; Remission

The defendant may, at any time after the imposition of an obligation to repay the costs of his court-appointed defense, petition the social service agency serving the court or other designated agency administering the provisions of this Act to remit all or part of the amount due or otherwise to modify the terms of the repayment. The agency shall review the petition pursuant to standards and procedures to be promulgated by such agency and may remit all or part of the amount due or otherwise modify the terms of the repayment upon a determination that the defendant's financial circumstances have changed or that continued imposition of the obligation would pose an undue hardship to the defendant or his dependents. There shall be no limitation on the number of such petitions available to the defendant. Should the defendant disagree with the agency's decision, he shall be afforded two appeals from this decision to the court which originally imposed the repayment order. Upon notice of such appeal, the court shall conduct a hearing pursuant to all procedures and guidelines set forth in section 8 of this Act. Upon a determination that the defendant's financial circumstances have changed or that continued imposition of the obligation would pose an undue hardship to the defendant or his dependents, the court may remit all or part of the amount due or otherwise modify the terms of the repayment.

Section 11. Repayment Order Has Effect of Civil Judgment

An order of repayment will have the effect of a civil judgment and all exemptions and protections available to civil judgment debtors generally will apply to a person ordered to repay the costs of his court-appointed defense.

Section 12. Contempt Barred

No order of repayment shall be enforced by contempt proceedings.

Section 13. Limitations

In no instance shall an obligation to repay the costs of a court-appointed defense be imposed after the expiration of one year, measured from the date of the conclusion of formal proceedings for which counsel was appointed; however, if the obligation is imposed within the one year permissible period, payments may extend for up to two years following their imposition.